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Video Poker: A Survey of Recent Developments Surrounding the Legal And Moral Debate

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VIDEO POKER: A SURVEY OF RECENT DEVELOPMENTS SURROUNDING THE LEGAL AND MORAL DEBATE

I. INTRODUCTION

In recent years, South Carolinians have engaged in a heated debate involving video poker.[1] In fact, some have considered video poker "the most important social and policy issue facing the state's citizens and elected officials."[2] Some of the most widely publicized debates have centered on nonlegal issues such as the morality of video poker and the economic impact the video poker industry has had on South Carolina citizens. Video poker advocates have argued that video poker provides jobs and money.[3] Opponents of video poker argued that it contributes to moral decay, the break-up of families, higher crime rates, and losses in worker productivity.[4]

The industry has had a turbulent legal history. In 1998 video poker achieved a minor victory when the Supreme Court of South Carolina declared that video poker was not an illegal lottery.[5] Since this ruling, however, video poker has experienced numerous setbacks in the State's courts culminating in the total ban of the industry. The purpose of this Note is to summarize the wide range of legal developments that arose this past year regarding video poker and to analyze some of these developments. Section II of this Note generally provides the backdrop of the political battle of video poker over the past years. Section III examines gamblers' remedies under South Carolina's Gambling Act.[6] Section IV addresses issues presently concerning the video poker industry which would have been key issues if the ban had not been imposed – specifically a pending case in which video poker plaintiffs seek class

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1. *See generally* Michael William Eisenrauch, Note, *Video Poker and the Lottery Clause: Where Common Law and Common Sense Collide*, 49 S.C. L. REV. 549 (1998) (explaining the evolution of video poker in South Carolina and the effect of South Carolina's lottery clause).

2. *American Bingo Gets a Boost After South Carolina Court Upholds Video Gambling*, DOW JONES ONLINE NEWS, Nov. 19, 1998, *available in* WL SCNEWS (quoting South Carolina Attorney General Charlie Condon).

3. Henry Eichel, *Each Side's Poker 'Facts' Questioned*, THE STATE (Columbia, S.C.), Sept. 26, 1999, at B1; *see also* Robert E. McCormick, *An Analysis of Potential New Tax Revenues on Video Poker Operations in South Carolina*, at 1, 9 (Collins Entertainment, Greenville, S.C., Aug. 1999) (on file with the SOUTH CAROLINA LAW REVIEW) (noting that video poker accounted for approximately $1.45 billion of income and 57,000 jobs in South Carolina in 1998).

4. Eichel, *supra* note 3, at B1.

5. Johnson v. Collins Entertainment Co., 333 S.C. 96, 104, 508 S.E.2d 575, 579 (1998). *See generally* Eisenrauch, *supra* note 1(explaining the evolution of video poker in South Carolina and the effect of South Carolina's lottery clause until 1998).

6. S.C. CODE ANN. §§ 32-1-10 to 32-1-290 (Law. Co-op. 1991).

certification in a federal district court.[7] Section IV also discusses two future issues facing South Carolina courts in light of the video poker ban beginning July 1, 2000: (1) whether video poker machines will become contraband per se as of July 1, 2000, even if the machines are not operational; and (2) the applicability of the Takings Clause to the video poker machine owners as of the date video poker machines become illegal.

II. THE POLITICAL BATTLE

Video poker supporters and opponents alike have held strong opinions regarding the legality of video poker and have experienced various victories and disappointments during the past year. Video poker opponents argued that video poker is one of the "greatest threats to the state in its history."[8] These opponents supported a ban of video poker because they believe video poker gambling has serious social impacts on crime and family unity.[9] On the other hand, supporters feared that a ban on video poker would have many of the same effects because banning video poker will put people out of work and cause South Carolina to lose money.[10]

After the 1998 South Carolina Supreme Court decision holding that video poker is not an illegal lottery,[11] supporters viewed Jim Hodges's gubernatorial election as the next positive step in the future of the industry.[12] The 1998 governor's race often centered around the issue of a state-wide lottery and whether to ban video poker. While Republican David Beasley, South Carolina's incumbent governor, supported a ban of video poker, Democrat Jim Hodges supported a state-wide referendum allowing voters to decide whether or not to keep video poker legal but heavily taxed.[13] Issues arose during the race regarding campaign contributions supplied by the video poker owners to both candidates.[14] Advertisements also surfaced suggesting that Democrats and video poker owners were tied to the mob and organized crime.[15]

Even after Hodges won the election, the video poker fight was far from over. The South Carolina State House of Representatives stood firm against

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7. Johnson v. Collins Entertainment, No. 3:97-2136-17 (D.S.C filed Jul. 16, 1997).

8. Murray Glenn, *Justices Rule Video Poker Legal: Decision Will Bring Boom for Upstate Businesses*, SPARTANBURG HERALD-JOURNAL, Nov. 20, 1998, at A1.

9. *Id.*

10. Eichel, *supra* note 3, at B1; *see also* McCormick, *supra* note 3, at 1, 9.

11. Johnson v. Collins Entertainment, 333 S.C. 96, 508 S.E.2d 575 (1998).

12. Michael Sponhour, *3,000 New Video Poker Machines Licensed*, THE STATE (Columbia, S.C.), Feb. 11, 1999, at A1.

13. *New GOP Ads Suggest Poker Industry Tied to Mob*, THE HERALD (Rock Hill, S.C.), Mar. 31, 1998, at 8A [hereinafter *New GOP Ads*].

14. *Hodges Gets Help from Industry*, THE HERALD (Rock Hill, S.C.), Jan. 18, 1998, at 8B.

15. *See New GOP Ads*, *supra* note 13, at 8A; *Legislators Stand Firm on $125 Poker Cap*, SPARTANBURG HERALD-JOURNAL, May 14, 1999, at A1 [hereinafter *Legislators Stand Firm*].

efforts to abolish some of the restrictions on the industry.[16] Section 2791 of the Video Games Machines Act[17] limited payouts to $125 a game for credits earned while playing video poker.[18] Although the Video Games Machines Act has been in effect since 1993, the payout cap had not been enforced for the following six years.[19]

III. THE COURTS WEIGH IN

A. Federal Court: Johnson v. Collins Entertainment Co.

In April of 1999, Federal District Judge Joseph F. Anderson issued a permanent injunction against video poker owners and operators from paying more than $125 per hand in *Johnson v. Collins Entertainment Co.*[20] The plaintiffs were addicted gamblers alleging that violations of various state laws by video poker owners and operators induced the plaintiffs to gamble excessively.[21] The case was removed to federal court because one of the plaintiffs' claims involved the federal Racketeer Influenced and Corrupt Organizations Act (RICO).[22]

The plaintiffs requested a permanent injunction against the defendants enforcing the payout limit of $125 per day pursuant to section 12-21-2791.[23] The defendants argued that there were two possible interpretations of the statute. First, that the statute could be interpreted to allow the full amount of the winnings to be paid to the gambler, but the gambler could only receive up to $125 per day.[24] In other words, if a player won $500 in a hand, the player could receive up to $125 a day for four consecutive days. Second, the defendants argued that the statute could be interpreted to allow payouts of any amount as long as the payout did not equal more than $125 above the amount placed in the machine.[25] The federal district court rejected the defendants' contentions and interpreted section 12-21-2791 of the South Carolina Code as "set[ting] a maximum cash payout [of $125 a day] regardless of the amount of money placed in the machine."[26]

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16. *Legislators Stand Firm*, *supra* note 15, at A1 (reporting that House legislators are standing firm on the $125 a day winning cap for video poker players).

17. S.C. CODE ANN. § 12-21-2791 (West Supp. 1999), *repealed by* 1997 Act No. 125, Part I, § 8 (eff. July 1, 2000).

18. Johnson v. Collins Entertainment Co., 1999 WL 1565207, *1 (D.S.C. Apr. 28, 1999).

19. *Id.* at *5.

20. *Id.*; *see also* Johnson v. Collins Entertainment Co., 1999 WL 1565199 (D.S.C. Apr. 28, 1999).

21. *Johnson*, 1999 WL 1565199, at *1.

22. *Id.*

23. *Id.* at *2

24. *Id.* at *7.

25. *Id.*

26. *Id.* at *6.

The defendants appealed Judge Anderson's ruling and the Fourth Circuit reversed the injunction, holding that the district court should have abstained from interpreting South Carolina's state law.[27] Even though the case was removed because of the RICO claim, which presents a federal question, the essence of the RICO claims were based on interpretation of state law.[28] Therefore, the injunction enforcing the $125 payout cap was vacated and remanded in order for the state courts to interpret the state statutes in question.[29]

The appeal was not decided until December 27, 1999, after the statewide video poker referendum was ultimately found unconstitutional. Therefore, the lifting of the injunction will soon be moot.

B. South Carolina's Gambling Act and Justice v. Pantry

South Carolina's Gambling Act was enacted to prevent gamblers from losing income as a result of gambling, and thus leaving their families without money for food and shelter.[30] Based upon cases addressing the application of the statutes, it appears the Act was readily enforced and the penalties imposed were of great concern to video poker machine owners and operators.

Under South Carolina's Gambling Act, video poker machine operators are liable for treble damages to plaintiffs that sue on behalf of players who lose money.[31] Section 32-1-10 creates a cause of action against video poker machine operators when a person, in one sitting, loses fifty dollars or more.[32] The legislature adopted the statute to protect the family of the gambler from the gambler's addiction or impulses.[33] Section 32-1-20 permits anyone, except the player who loses the money, to bring suit against the owners and operators of the machines for treble damages.[34] A player may sue on her own behalf to recover losses within three months, but may not recover treble damages.[35]

In another setback for video poker machine owner and operators, the South Carolina Supreme Court held in *Justice v. Pantry*[36] that plaintiffs are not required to specify the dates in which money was lost.[37] In *Justice*, the plaintiff filed suit under section 32-1-20 against several convenience store owners to

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27. *Id.* Johnson v. Collins Entertainment Co., 199 F.3d 710, 715 (4th Cir. 1999).
28. *Id.* at 722.
29. *Id.* at 729.
30. *See* Johnson v. Collins Entertainment Co., 1999 WL 1565199, *7 (1999); Berkebile v. Outen, 311 S.C. 50, 55, 426 S.E.2d 760, 763 (1993); McCurry v. Keith, 325 S.C. 441, 444, 481 S.E.2d 166, 168 (Ct. App. 1997).
31. S.C. CODE ANN. §§ 32-1-10, 32-1-20 (Law. Co-op. 1991).
32. § 32-1-10.
33. *See* Berkebile v. Outen, 311 S.C. 50, 54, 426 S.E.2d 760, 763 (1993); McCurry v. Keith, 325 S.C. 441, 444, 481 S.E.2d 166, 168 (Ct. App. 1997).
34. § 32-1-20.
35. Mullinax v. J.M. Brown Amusement Co., 333 S.C. 89, 93, 508 S.E.2d 848, 849 (1998).
36. Justice v. Pantry, 335 S.C. 572, 518 S.E.2d 40 (1999).
37. *Id.* at 579, 518 S.E.2d at 43.

recover gambling losses incurred by his mother and sister.[38] The defendants claimed that the plaintiff's complaint was insufficiently pled.[39] The plaintiff alleged in his complaint that " on several dates throughout the calendar years of 1995-1996, [sister/mother] of the Plaintiff, while gambling on the poker video [sic] machines, owned and/or operated by the Defendants, lost in excess of Fifty Dollars ($50.00) per sitting."[40] Even though the complaint failed to mention when or to whom the losses occurred, the court held that the complaint sufficiently alleged the statutory elements of the cause of action because it stated that plaintiff's mother and sister lost money in excess of fifty dollars at one sitting using machines owned or operated by the defendants.[41] The dates of the losses were not required in the complaint, even to determine whether the one-year statute of limitations is valid.[42]

The Gambling Act, however, does not always assure gamblers of holding a winning hand. One limitation to recovery involves the defendant's right to a setoff of the plaintiff's recoverable damages by the amount that the gambler won while gambling.[43] The court stated, "[t]he intent of the legislature . . . was to punish excessive gambling and protect the gambler and his family against the gambler's excesses, not to give gamblers a windfall."[44]

After *Justice,* video poker owners and operators faced the prospect of lawsuits, not by their customers, but by anyone with knowledge of a customer's loss resulting from playing video poker.[45] Since section 32-1-20 does not limit standing to a family member (whom the statute was intended to protect), an owner has little protection from paying threefold the amount of money lost in the machines. This broad conception of standing threatens numerous lawsuits with exposure to high awards of damages.

If the video poker referendum had proceeded and voters had decided to keep video poker legalized, section 32-1-10 would have been changed so that gamblers could no longer sue for losses over fifty dollars.[46] Due to the video poker ban, section 32-1-60 will be enacted which will limit the application of sections 32-1-10, 32-1-20, and 32-1-30 "only to those gambling activities not authorized by law."[47] Therefore, because video gambling will no longer be authorized by law, any losses incurred through video gambling will still be

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38. *Id.* at 575, 518 S.E.2d at 41.
39. *Id.*
40. *Id.* at 577-78, 518 S.E.2d at 43.
41. *Id.*
42. *Id.* at 579, 518 S.E.2d at 43-44.
43. *McCurry*, 325 S.C. at 444, 481 S.E.2d at 168.
44. *Id.* at 446, 481 S.E.2d at 169.
45. *But see* Mullinax v. J.M. Brown Amusement Co., 333 S.C. 89, 93, 508 S.E.2d 848, 849 (1998) (acknowledging that if the plaintiff acted in collusion with the gambler on whose behalf the action was brought recovery would be barred).
46. *Payout Cap Traded for Referendum*, THE HERALD (Rock Hill, S.C.), June 17, 1999, at 1A [hereinafter *Payout Cap*].
47. 1999 S.C. Acts 125 § 18.

punishable by treble damages against the owner or operator of the video poker machine used by the gambler.

C. *RICO and Video Poker*

In *Gentry v. Yonce*,[48] the South Carolina Supreme Court held that video poker operators may now be classified as racketeers under RICO.[49] The plaintiffs filed a class action suit against the owners and operators of video poker machines in Saluda and Newberry counties alleging violations of RICO and South Carolina's Unfair Trade Practices Act.[50] The circuit court dismissed the RICO claim because the plaintiffs failed to plead that claim with particularity, as required under Rule 9(b) of the South Carolina Rules of Civil Procedure.[51] The supreme court reversed, holding that only RICO claims alleging fraud need to be pled with particularity.[52]

To establish a claim under RICO, plaintiffs must prove that the owner of the video poker establishment received a substantial source of business from gambling machines, and committed at least one other act that carries the possibility of imprisonment for more than a year.[53] If found guilty of a civil RICO violation, machine owners must pay threefold damages to the plaintiff and the cost of the suit, including attorneys' fees.[54]

Congress enacted RICO under Title IX of the Organized Crime Control Act of 1970[55] to combat organized crime.[56] Today, most civil RICO suits have nothing to do with organized crime.[57] In 1990, the House of Representatives recognized that many people were using civil RICO in ways Congress did not intend.[58] Thus, Congress amended the statute and intended to limit private litigants' use of RICO in civil cases.[59] In fact, Congress specifically stated that all RICO claims must be plead with particularity.[60] *Gentry* simplifies plaintiffs' pleadings not involving fraudulent claims in civil RICO cases, contrary to Congress's intentions.

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48. 337 S.C. 1, 522 S.E.2d 137 (1999).
49. *Id.* at 11, 522 S.E.2d at 143.
50. *Id.* at 4, 522 S.E.2d at 138-39.
51. *Id.* at 4-5, 522 S.E.2d at 139.
52. *Id.* at 6-7, 522 S.E.2d at 139.
53. 18 U.S.C. § 1961(1)(A) (Supp. III 1998).
54. 18 U.S.C. § 1964(c) (Supp. III 1998).
55. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified at 18 U.S.C. § 1961 (1988)).
56. *Id.* (statement of Findings and Purpose).
57. H.R. Rep. No. 102-312 at 4 (1991).
58. H.R. Rep. No. 102-312 at 5.
59. H.R. Rep. No. 102-312 at 2-3.
60. *Id.*

Seven elements constitute a RICO cause of action: [61] (1) the commission of two or more predicate acts[62] (2) which constitute a pattern[63] (3) of racketeering activity[64] through which (4) the culpable person (5) invests in, maintains an interest in, participates in, or conspires to do any of the preceding in (6) an enterprise, and (7) such activities affect interstate commerce.[65] Usually, the predicate acts required under RICO include acts of fraud[66] or are treated as acts of fraud for the purposes of establishing a RICO violation.[67] When the predicate acts involve fraud, it is undisputed that the pleadings must be stated with particularity.[68] However, when the predicate acts of an alleged RICO violation do not involve fraud, courts are split regarding the applicability of Rule 9(b).[69]

The court in *Gentry* recognized that some courts require that particularity must be plead in all RICO claims, regardless of the presence of fraud.[70] However, because the underlying predicate acts involved violations of a South Carolina statute, not fraud, the court held Plaintiffs' pleadings need not comply

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61. 18 U.S.C. §§ 1961-1962 (1994 & Supp. III 1998); *Gentry*, 337 S.C. 1, 6 n.3, 522 S.E.2d 137, 139 n.3 (1999) (citing Roper v. Dynamique Concepts, 316 S.C. 131, 447 S.E.2d 218 (1994)).

62. 18 U.S.C. § 1961(5); Sedima v. Imrex Co., 473 U.S. 479, 527 (1985) (stating that just two predicate acts are insufficient to constitute a per se pattern of racketeering activity). The *Sedima* test was applied by the Fourth Circuit. *See, e.g.*, HMK Corp. v. Walsey, 828 F.2d 1071, 1074 (4th Cir. 1987) (refusing to adopt an all-encompassing definition of pattern but holding that the "existence of a pattern thus depends on context, particularly on the nature of the underlying offenses"); *see also* LaVay Corp. v. Dominion Fed. Sav. & Loan Ass'n, 830 F.2d 522, 529 (4th Cir. 1987) (finding that a single breach of fiduciary duty did not constitute pattern).

63. 18 U.S.C. § 1961(5) (a pattern of racketeering activity requires at least two acts of racketeering activities within ten years of each other).

64. Racketeering activity includes any act or threat involving gambling chargeable under State law and is punishable by imprisonment for more than one year. 18 U.S.C. § 1961(1)(A) (Supp. III 1998).

65. Roper v. Dynamique Concepts, Inc., 316 S.C. 131, 142, 447 S.E.2d 218, 224 (1994).

66. *See* Florida Dep't of Ins. v. Debenture Guar., 921 F. Supp. 750, 754-55 (M.D. Fla. 1996) (allegations of securities fraud); Grant v. Union Bank, 629 F. Supp. 570, 575 (D. Utah 1986) (allegations of mail and wire fraud); Crystal v. Foy, 562 F. Supp. 422, 424-25 (S.D.N.Y. 1983) (allegations of fraudulent conduct violating the Securities Exchange Act).

67. *See* Plount v. American Home Assurance Co., 668 F. Supp. 204 (S.D.N.Y. 1987); Schnitzer v. Oppenheimer & Co., 633 F. Supp. 92 (D. Or. 1985); Taylor v. Bear Sterns & Co., 572 F. Supp. 667 (N.D. Ga. 1983). *But see* Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786 (3d Cir. 1984); United States v. District Council, 778 F. Supp. 738 (S.D.N.Y. 1991); United States v. Bonanno Organized Crime Family, 683 F. Supp. 1411 (E.D.N.Y. 1988).

68. "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." S.C. R. Civ. P. 9(b).

69. *See Plount*, 668 F. Supp. at 207 (holding Rule 9 applies); *Schnitzer*, 633 F. Supp. at 97 (finding Rule 9 applies); *Taylor*, 572 F. Supp. at 682 (finding Rule 9 applies). *But see Seville Indus. Marsh. Corp.*, 742 F.2d at 791-92 (finding Rule 9 does not apply); *District Council*, 778 F. Supp. at 746-47 (holding Rule 9 does not apply); *Bonanno Organized Crime Family*, 683 F. Supp. 1421-28 (finding Rule 9 does not apply).

70. Gentry v. Yonce, 337 S.C. 1, 7, 522 S.E.2d 137, 140 (1999).

with Rule 9.[71] The court only cited one decision dated after the 1990 RICO Amendment which was filed prior to enactment of the House Report dated October 27, 1990.[72] The rest of the cases cited were decided before the 1990 Amendment.[73]

The predicate acts by the video poker machine operators and owners include offering special inducements to customers through logos on the machines offering a "jackpot"[74] and receiving primary or substantial gross proceeds from video gaming devices.[75] Because video poker casino owners inherently receive their primary or substantial gross proceeds from video gaming devices, any other predicate act, which may be minor by itself, will subject video poker casino owners to RICO claims. The potential for civil RICO suits is extremely damaging to owners of video poker casinos or other defendants involved in cases in which the predicate acts are not fraudulent because a successful plaintiff can recover threefold the damages sustained in the suit, including reasonable attorney fees.[76]

Since video poker will become unlawful this summer, *Gentry*'s only impact on the video poker industry is on pending cases and cases filed based on acts occurring prior to July 1, 2000. However, the supreme court's ruling that nonfraudulent predicate acts do not have to be plead with particularity increases the availability of RICO claims, regardless of whether the case involves video poker issues.

D. *The Referendum and* Joytime Distributors v. State*: The Death of Video Poker*

In May of 1999, both the Senate and the House heavily debated whether to raise the payout cap to $900 a hand instead of the existing limit of $125 per day.[77] The House ultimately succeeded in keeping the $125 a day cap on winnings,[78] but only after their June 16, 1999 compromise which scheduled a

71. *Id.* at 8, 522 S.E.2d at 140.

72. *Id.* at 6, 522 S.E.2d at 140 (citing United States v. District Council, 778 F. Supp. 738 (S.D.N.Y. 1991)).

73. *Id.* at 6, 522 S.E.2d 140 (citing Plount v. American Home Assurance Co., 668 F. Supp. 204 (S.D.N.Y. 1987); Schnitzer v. Oppenheimer & Co., 633 F. Supp. 92 (D. Or. 1985); Taylor v. Bear Stearns & Co., 572 F. Supp. 667 (N.D.Ga. 1983).

74. S.C. CODE ANN. § 12-21-2804(B), (F) (West Supp. 1998) (prohibiting the offering of special inducements and subjecting willful violators to punishments of up to ten thousand dollars or imprisonment of no more than two years, or both).

75. S.C. CODE ANN. § 12-21-2804(A), (F) (West Supp. 1998) (prohibiting businesses from receiving primary or substantial gross proceeds from video gaming devices and subjecting violators to punishment of up to ten thousand dollars or imprisonment of no more than two years, or both).

76. 18 U.S.C. § 1964(c) (Supp. III 1998).

77. *Legislators Stand Firm, supra* note 15, at A1.

78. *Id.*

referendum for November 2, 1999.[79] The referendum's purpose was to allow the public to decide whether video poker should remain legal.[80] If voters decided to keep video poker, the referendum would raise the payout cap to $500 per sitting and impose a gambling business tax expected to raise approximately $132.5 million a year.[81] If voters rejected video poker, all video poker payouts would cease by June 30, 2000.[82]

For the most part, both sides of the video poker debate wanted the referendum to proceed.[83] However, Joytime Distributors & Amusement Company of Greenville (Joytime) challenged the constitutionality of the referendum.[84] Joytime asserted that Part II of the referendum, which would have determined whether payouts would be allowed to continue in South Carolina, was an "unconstitutional delegation of power by the legislature to the voters of this State."[85] The South Carolina Supreme Court agreed, holding that Part II of the referendum was unconstitutional because South Carolina's Constitution did not give the people the right of direct legislation by referendum.[86] Because the court also held that Part II of the referendum was severable from the rest of the referendum,[87] Part I of the Act, which bans video poker as of July 1, 2000, stands unless the General Assembly decides otherwise.[88]

With this decision, the state's highest court effectively killed the video poker industry. Now, even before the ban comes into effect, the industry is experiencing losses.[89] Video poker's gross profit is down thirty-one percent from 1999 and seventeen percent from 1998, and the South Carolina Department of Revenue expects profits to continue falling.[90] Video poker opponents are thrilled with the apparent end of video poker in South Carolina and do not expect the legislature to revisit the issue.[91] On the other hand, video

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79. *Payout Cap*, *supra* note 46, at 1A.
80. *Id.*
81. *Id.*
82. Sarah O'Donnell, *Operators Get Look at Life After Referendum*, THE HERALD (Rock Hill, S.C.), Sept. 1, 1999, at 1A.
83. Jim Davenport, *Video Gambling Referendum Arguments Heard in Supreme Court*, ASSOCIATED PRESS NEWSWIRES, Oct. 12, 1999, *available in* WL, APWIRES.
84. Sarah O'Donnell, *Supreme Court Decision Cancels Nov. 2 Referendum*, THE HERALD (Rock Hill, S.C.), Oct. 15, 1999, at 1A.
85. Joytime Distributors and Amusement Co. v. State, No. 25007, 1999 WL 969280, at *1 (S.C. Oct. 24, 1999), *cert. denied*, 68 U.S.L.W. 3566 (U.S. Apr. 24, 2000) (No. 99-1406).
86. *Id.* at *4.
87. *Id.* at *9.
88. *Id.* at *1, *11.
89. Chris Roberts, *Poker Industry Breathing Its Last*, THE STATE (Columbia, S.C.), Feb. 15, 2000, at B1.
90. *Id.*
91. O'Donnell, *supra* note 84, at 1A.

poker advocates have not acquiesced and are now exploring the possibility of other lawsuits.[92]

IV. CONTINUING AND FUTURE LITIGATION INVOLVING THE VIDEO POKER INDUSTRY

Although many legal issues stemming from the video poker controversy will be moot as of the effective date of the video poker ban, some issues involving video poker will continue even after the industry is dead. Further, new issues will emerge as a result of the ban. One on-going class action case brought by addicted gamblers, *Johnson v. Collins Entertainment*,[93] explores whether the Fourth Circuit will apply a strict or liberal construction of Rule 23 when certifying a class of plaintiffs. Even though the plaintiffs seeking certification in *Johnson* are gamblers, the outcome of the case will affect the certification of future class actions within the Fourth Circuit's jurisdiction, regardless of the parties' involvement in the video poker industry.

Future litigation will address whether video poker machines will be considered "contraband" and whether South Carolina's declaration that personal property which is lawful when purchased, but later declared unlawful, constitutes a "taking" of the property.[94] Recently decided cases in South Carolina involving these issues serve as aids in anticipating the outcome of future contraband and "takings" litigation.[95]

A. Class Certification

One of the newest video poker controversies involves a potential class action against video poker machine owners.[96] Specifically, the debate centers around whether the federal court should certify the plaintiffs' class against the video poker defendants.[97] Plaintiffs claim, among other things, injuries under RICO.

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92. *See id.*; Jeff Wilkinson, *Tears, Cheers and Jeers Greet Poker's Death Sentence*, THE STATE (Columbia, S.C.), Oct. 15, 1999, at A1 (noting owners of video poker machines may file federal lawsuits for "taking of property" if the machines are considered contraband after July 1, 2000).

93. Johnson v. Collins Entertainment, No. 3:97-2136-17 (D.S.C filed Jul. 16, 1997).

94. Clif LeBlanc, *State Threatens to Seize, Destroy 'Illegal' Machines*, THE STATE (Columbia, S.C.), Oct. 16, 1999 at A1. As this Note was going to press, the South Carolina Supreme Court agreed to consider a lawsuit filed by two Greenville video poker companies. The plaintiffs allege a taking of private property and denial of due process. Clif LeBlanc, *S.C. High Court to Hear Latest Poker Lawsuit*, THE STATE (Columbia, S.C.), June 2, 2000, at B1.

95. *See* South Carolina v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000); Mibbs v. Department of Revenue, 337 S.C. 601, 524 S.E.2d 626 (1999).

96. Johnson v. Collins Entertainment, No. 3:97-2136-17 (D.S.C filed Jul. 16, 1997).

97. *Id.*

1. *Recent U.S. Supreme Court Interpretation of Class Certification*

A consideration of recent decisions relating to class certification is helpful when anticipating what the district court might do in *Johnson*. In the most recent Supreme Court case addressing the issue of class certification, *Amchem Products, Inc. v. Windsor*,[98] the Court strictly construed Rule 23 and denied class certification in a mass tort claim.[99] The Court said the plaintiffs failed to meet the requirements of class certification due to an inability to prove commonality of issues of fact and law and adequacy of representation.[100] The lead plaintiffs were workers who were occupationally exposed or received bystander exposure through the occupation of a spouse to the defendant's asbestos products.[101] Some plaintiffs manifested physical injuries related to the asbestos exposure, while others were exposed to the asbestos but had not yet developed any existing injuries.[102]

The Supreme Court strictly construed the second step of the class certification test,[103] applying Rule 23(b)(3).[104] In *Amchem* common questions of law or fact did not predominate over questions of law or fact unique to the individual members, even though all class members were exposed to asbestos and maintained an interest in receiving compensation.[105] Evidence of non-commonality between class members included exposure by class members to different asbestos products, varying times of exposure, differences in extent of

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98. Amchem Prod., Inc. v. Windsor, 521 U.S. 591 (1997). *Amchem* was a "settlement" class action. Both sides of the asbestos litigation participated in designing the class and presenting it to the court. The Court held that these types of class actions must also meet Federal Rule 23's requirements. *Id.* at 597-605, 619-21.

99. *Id.* at 597

100. *Id.* at 622-28.

101. *Id.* at 602.

102. *Id.* at 591.

103. FED. R. CIV. P. 23(a). A two-step test must be satisfied before the court will certify a class. Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 613 (1997). The first step entails satisfying four prerequisites identified in Rule 23(a), including numerosity, commonality, typicality, and adequacy of representation. *Id.* Next, the party seeking certification must determine and satisfy at least one of the requirements under Rule 23(b): (1) failure to maintain a class action would prejudice the opposing party, (2) the opposing party has acted or refused to act on grounds generally acceptable by the class, or (3) a class action is superior to other forms of adjudication. *Id.* at 614-15.

The party seeking class certification carries the burden of proof in demonstrating that certification of the class is proper. *See* General Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982); *In Re* A. H. Robins Co., 880 F.2d 709, 728 (4th Cir. 1989). In order to maintain a class action, the seeking party must prove the existence of an identifiable class and that the entire party seeking certification is a member of the proposed class. *Id.*

104. *Amchem*, 521 U.S. at 622. Rule 23(b)(3) requires two additional requirements beyond the Rule 23(a) prerequisites. FED. R. CIV. P. 23(b)(3). First, the questions common to the class must predominate over individual questions, and second, class resolution must be the superior method of adjudication. *Id.*

105. *Amchem*, 521 U.S. at 624.

the injuries, and differences in causation, such as the effect of cigarette smoking on the respective asbestos-related disease.[106]

Further, the Court found that a class action form of adjudication is not always superior to individual adjudication.[107] Representatives will not protect unnamed class members from unjust or unfair settlements because the representative class members do not have common interests with the rest of the class.[108]

2. *Fourth Circuit's Liberal Construction Before and After* Amchem

Prior to *Amchem*, the Fourth Circuit applied a liberal construction of Rule 23 when determining whether to certify a class.[109] *In Re A.H. Robins* involved class certification of a mass tort suit involving the Dalkon Shield, an intrauterine birth control device.[110] Plaintiffs sought class certification in an action against Aetna, the manufacturer's insurer, for injuries resulting from the defective device.[111] Prior to a final determination on certification, the parties entered into a settlement conditioned on certification.[112] The Fourth Circuit affirmed the class certification and settlement orders.[113]

The court applied a liberal construction of the two-step test requiring plaintiffs to meet all prerequisites of Rule 23(a) and at least one requirement of Rule 23(b).[114] Because the primary defense in mass tort litigation involving products liability varies little among individuals in relation to the large amount of time required to maintain individual trials, the court supported allowing a class action because it benefits the court and litigants by conserving the time and resources of both.[115]

The court criticized the "strict scrutiny" standard of construction when it held that the proper standard of determining the applicability of a class action is to favor class actions rather than oppose them.[116] The court further held that individualized damages do not disqualify members from a class, as suggested in *Amchem*, because judicially approved settlements, compared to separate trials, more efficiently determine the disbursement of the total settlement among class members.[117]

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106. *Id.*
107. *Id.* at 623.
108. *Id.* at 623 & n.18.
109. *In Re A.H. Robins Co.*, 880 F.2d 709, 729 (4th Cir. 1989).
110. *Id.* at 710.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 728-29.
115. *Id.* at 734-35.
116. *Id.* at 729.
117. *Id.* at 735.

Contrary to *In Re A.H. Robins*, courts no longer liberally construe Rule 23 in certifying class actions since the Supreme Court's ruling in *Amchem*. For example, in *Broussard v. Meineke Discount Muffler Shops, Inc.*,[118] the Fourth Circuit applied a strict construction of Rule 23 when it reversed the holding of the district court approving certification of plaintiffs' class because the class representatives did not suffer the same injury or have the same interest as the rest of the class.[119]

The court noted that although the breakdown of the class into categories provided evidence that the class representatives of the same category shared similar interests and injuries with the rest of their category, the class as a whole was not similar.[120] In its determination that the plaintiffs failed to prove common questions of fact or law the Fourth Circuit considered five factors.[121] First, the allegations involved multiple contracts among the plaintiffs.[122] Second, some of the allegations involved oral statements between the plaintiffs and defendants, which likely varied between the members of the class.[123] Third, the court considered the allegations of fraudulent representations by the defendant further evidence that the proposed class lacked common questions of law or fact because the fraudulent representations likely differed between the purchasers.[124] Fourth, the court found that tolling the statute of limitations on plaintiffs' claims could only be applied on an individual basis.[125] Finally, the court concluded that the determination of claims for lost profit damages must be done on an individual basis.[126]

Class certification is often denied in cases involving allegations of fraud.[127] Fraud cases usually require plaintiffs to demonstrate their inability to discover the omitted information elsewhere, which requires a case-by-case analysis.[128]

3. *Application to* Johnson v. Collins Entertainment

The Fourth Circuit may conclude that the video poker plaintiffs do not meet the predominance requirements as set forth in *Amchem*. In order to satisfy

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118. Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331 (4th Cir. 1998).
119. *Id.* at 344.
120. *Id.* at 338.
121. *Id.* at 340.
122. *Id.*
123. *Id.* at 340-41.
124. *Id.* at 341. The court pointed out that class certification is often denied in cases involving allegations of fraud. *Id.* Fraud cases usually require plaintiffs to demonstrate their inability to discover the omitted information elsewhere, which requires a case-by-case analysis. *Id.* at 342; *see also* Castano v. American Tobacco Co., 84 F.3d 734, 745 (5th Cir. 1996) (denying class certification in any fraud actions in which reliance on the fraud is an issue).
125. *Broussard*, 155 F.3d at 342.
126. *Id.*
127. *Id.*
128. *Id.* at 342 (citing Zimmerman v. Bell, 800 F.2d 386, 390 (4th Cir. 1986)).

the predominance requirement, questions of law or fact common to all of the members in the class must exist.[129]

In *Amchem* the court found common exposure by the plaintiffs to asbestos products manufactured by the defendants was not enough to establish that the class representatives could adequately represent the unnamed class members.[130] Accordingly, in *Johnson v. Collins Entertainment,* the mere commonality of class members losing money to the defendant video poker representatives may not adequately satisfy the predominance requirement. Plaintiffs must also prove common causation for the losses to the video poker defendants, along with other factors common to the class members, unless the plaintiffs succeed in showing that all the class members lost money in video poker machines as a result of illegal inducement by the defendants.

As pointed out in *Amchem,* the predominance criterion is much more demanding than simply having contact with a product produced or under the control of the Defendants.[131] The differences between the video poker plaintiffs seems analagous to the differences between the asbestos-exposed plaintiffs in *Amchem.* The court in *Amchem* noted that "[c]lass members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods."[132] Furthermore, the class members suffered various damages, and individual causation histories as a result of differing smoking histories.[133]

Likewise, video poker class members undoubtedly were exposed to video poker for different durations of time, for differing time periods, and used various machines with different owners. Accordingly, class members will have different damages which must be determined on an individual basis based on the amount of money lost to the defendants setoff by the amount of money won. Finally, causation will differ among class members because some will claim the jackpot logos induced them, others will claim to be addictive gamblers, and still others may claim additional reasons for playing the video poker machines.

B. Video Poker Machine Owners and Operators as Claimants

Contrary to most of the present and past litigation surrounding the video poker issue, future litigation will likely be initiated by the video poker industry instead of addicted gamblers. Until the video poker ban, gamblers brought suits against the owners and operators in order to recover their gambling losses. After the ban, the industry will lose significant amounts of money as well as the

129. FED. R. CIV. P. 23(a)(2).
130. *Amchem,* 521 U.S. at 625-26.
131. *Id.* at 623-24.
132. *Id.* at 626.
133. *Id.*

machines themselves and will want to seek restitution.[134] One way the poker industry may try to reduce their losses is by selling their machines to states that still allow video poker. Another way the industry may try to reduce their losses will be by instituting claims under the takings clause.[135] Recent cases supply a preview of how the courts are likely to resolve these issues.

1. Video Poker Machines as Contraband

Determining whether property is contraband is important because seized property which is *not* contraband should be returned to the owner once any criminal proceedings are completed.[136] On the other hand, contraband materials may not be returned to their rightful owner, even if the seizure of the material was improper or the person connected with the material was not convicted of a crime.[137]

There are two types of contraband: (1) contraband per se and (2) derivative contraband.[138] Property considered "contraband per se" is inherently unlawful to possess, such as illegal drugs.[139] Since a person cannot have a property right in material that is not subject to legal possession, the government does not need to file a forfeiture action to retain items which are contraband per se.[140] "Derivative contraband," on the other hand, are items that are only illegal based upon use.[141] For example, if an automobile is used in a felony, it is derivative contraband.[142] Derivative contraband is only forfeited pursuant to statute, so a forfeiture hearing is required in order for the government to retain the property.[143]

In a recent case, *South Carolina v. 192 Coin-Operated Video Game Machines*,[144] the South Carolina Supreme Court ruled that video poker machines, deemed illegal under section 12-21-2710 of the South Carolina Code,[145] were contraband per se and could be destroyed by the state, even though they were only being stored in a warehouse and were not operational.[146]

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134. LeBlanc, *supra* note 94, at A1.

135. *Justices Offer Road Map for Video Poker Endgame*, THE STATE (Columbia, S.C.), Feb. 20, 2000, at D2 [hereinafter *Justices Offer Road Map*]. See text accompanying *supra* note 94 regarding recent video poker litigation.

136. Boggs v. Merletti, 987 F. Supp. 1, 9 (D.D.C. 1997).

137. *Id.* at 10.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. 338 S.C. 176, 525 S.E.2d 872 (2000).

145. S.C. CODE ANN. § 12-21-2710 (West Supp. 1999). Section 12-21-2710 presently makes it illegal "to keep on the premises or operate" video poker machines unless they have the free play feature and meet specific requirements.

146. *192 Coin-Operated Video Game Machines*, 338 S.C. at190, 525 S.E.2d at 879.

The Appellants, owners of the machines, argued that because the machines were not fully operational, they were not illegal.[147] Using the terminology set forth in *Boggs v. Merletti*,[148] the owners argued that the video poker machines were derivative contraband, but not contraband per se. If the machines were derivative contraband, the state could only retain them if the machines were used in the furtherance of a crime *and* forfeited pursuant to a statute, which requires a hearing.[149]

The court, however, held "[t]he plain language of the statute [section 12-21-2710] makes clear the legislature's intent to outlaw mere possession of such machines."[150] Thus, mere possession of the machines was unlawful and violated section 12-21-2710 regardless of whether the machines were operational.

Interestingly, the court conceded that the machines would not have been considered contraband if they were only illegal as a result of a county-wide referendum terminating cash payouts.[151] Section 12-21-2809 of the South Carolina Code provides that even though no licenses for coin-operated devices may be issued for machines in counties where payouts were made illegal by referendum, "a person may . . . possess these machines in the county . . . for [the exclusive] purposes of storage, maintenance, or transportation."[152] Therefore, machines may be stored in counties where referendums have terminated cash payouts for credits, but the machines are not otherwise unlawful.[153] Section 12-21-2809 did not apply in this case because the machines did not become illegal by the result of a county referendum.[154] Only those owners whose machines were affected by a referendum could claim the protection of the storage provision of section 12-21-2809.[155]

The court's holding in *192 Coin-Operated Video Game Machines* will be especially important to the video poker industry as of July 1, 2000 because South Carolina courts may be presented with other cases dealing with whether the machines are contraband per se.[156] By converting all video poker machines into contraband per se as of July 2000, owners will lose money and property since their machines may be destroyed before they can be sold out of state or another use for the machines can be found. Section 12-21-2809 offers no succor because it will be repealed effective July 1, 2000.[157] Therefore, courts

147. *Id.* at 187-88, 525 S.E.2d at 878-79.
148. 987 F. Supp. 1 (D.D.C. 1997).
149. *Id.* at 10.
150. *192 Coin-Operated Video Game Machines*, 330 S.C. at 188, 525 S.E.2d at 879.
151. *Id.*
152. S.C. CODE ANN. § 12-21-2809 (West Supp. 1999).
153. *192 Coin-Operated Video Game Machines*, 330 S.C. at 190, 525 S.E.2d at 879.
154. *Id.*
155. *Id.*
156. *Justices Offer Road Map, supra* note 135, at D2.
157. 1999 S.C. Acts 125, § 8.

will likely render a harsh ruling that video poker machines are contraband per se, even if they are just being stored.[158]

One reason for the strictness of this result probably stems from the fact that the court decided *192 Coin-Operated Video Game Machines* on February 7, 2000, after the ban was announced. In an effort to reduce anticipated future litigation, this case appears to establish a bright-line rule that any machines, which are unlawful by statute, are inherently illegal and may be destroyed. Practically, however, the legislature's intent to prevent video gambling was accomplished when the machines were removed from operation and stored. Therefore, destroying the machines before they could be sold or moved is a harsh and probably unintended result.

2. *The Video Poker Ban as a Regulatory Taking*

Another issue of continuing litigation involves whether the ban of video poker and its subsequent transformation of the machines into contraband will violate the Takings Clause. If so, the industry may have recourse in which to recover some of their losses resulting from the ban; if not, the industry will have little recourse except to sell the machines to operators in other states before July1, 2000.

The Takings Clause of the Fifth Amendment ensures that private property shall not be taken for public use without just compensation.[159] The Takings Clause promotes fairness and justice in preventing a few people from bearing public burdens which should be borne by the public as a whole.[160] The most common type of takings case is one in which the government directly

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158. 1999 S.C. Acts 125, § 1; S.C. CODE ANN. § 12-21-2710 (West Supp. 1999). As of July 1, 2000, section 12-21-2710 will be amended to make it unlawful to possess any video poker machines. 1999 S.C. Acts 125, § 1. Section 12-21-2710 will be amended to read:

> It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind . . .
>
> Any person violating the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned for a period of not more than one year, or both.

S.C. CODE ANN. § 12-21-2710 (West Supp. 1999) (eff. Jul. 1, 2000).

159. U.S. CONST. amend. V.

160. Eastern Enters. v. Apfel, 524 U.S. 498, 522 (1998).

appropriates private property for its own use.[161] However, economic regulation by the government may also be a taking.[162]

Clearly, not every destruction or injury to property by the government qualifies as a taking.[163] In evaluating a regulation, courts consider the "justice and fairness" of the governmental action.[164] Although there is no set formula, factors used in analyzing whether the governmental action was unfair include "the economic impact of the regulation, its interference with investment backed expectations, and the character of the governmental action."[165]

Although the state-wide ban of video poker does not begin until July 1, 2000, a recent South Carolina Supreme Court case, *Mibbs v. South Carolina Department of Revenue*,[166] provides a preview of future litigation involving regulatory takings of video poker machines. In *Mibbs*, the South Carolina Supreme Court affirmed the trial court's ruling which held that a ban on cash payouts resulting from the November 1994 local referendums in Oconee and Anderson Counties did not result in a regulatory taking of Mibbs's property interest in contracts involving video poker machines.[167]

On July 1, 1993 the legislature enacted section 12-21-2806,[168] which provides for local referendums to determine whether to allow cash payouts on a county-by-county basis.[169] As a result several counties, including Oconee County and Anderson County, scheduled a local referendum regarding cash payouts for November 1994.[170] After section 12-21-2806 was enacted, but prior to the referendum, Mibbs entered into a five-year contract to place nine video poker machines in Mibbs's two convenience stores. Under the contract, Mibbs leased the machines free-of-charge in exchange for surrendering fifty percent of the profits to the owners of the machines.[171] Cash payouts in both counties became illegal on July 1, 1995 as a result of the referendums, and Mibbs's stores went out of business shortly after.[172]

The supreme court justified its rejection of Mibbs's allegation that the ban on cash payouts constituted a regulatory taking of his contracts by concluding that the second regulatory taking factor requiring a reasonable investment-backed expectation was absent.[173]

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161. *Id.*
162. *Id.* at 522-23.
163. *Id.* at 523.
164. *Id.*
165. *Id.* at 523 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)).
166. 337 S.C. 601, 524 S.E.2d 626 (1999).
167. *Id.* at 604-05, 524 S.E.2d at 627.
168. S.C. CODE ANN. § 12-21-2806 (West Supp. 1999), *repealed by* 1997 S.C. Acts 53, § 7.
169. *Mibbs*, 337 S.C. at 604, 524 S.E.2d at 627.
170. *Id.*
171. *Id.* at 605, 524 S.E.2d at 627.
172. *Id.* The court later struck down the law providing for the county referendums as unconstitutional because it did not apply statewide. Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272 (1996).
173. *Mibbs*, 337 S.C. at 605-606, 524 S.E.2d at 628.

The court determined that Mibbs did not have a reasonable investment-backed expectation for several reasons. First, Mibbs did not actually invest any money in the machines.[174] Under the contract, he was only to receive a percentage of profit from the machines.[175] Second, collateral damages are not recoverable under the Takings Clause.[176] Mibbs's damages were collateral because they were only lost profits and the contract did not entitle Mibbs to any minimum return.[177] Third, any interest that depends totally upon regulatory licensing, such as contractual rights to cash payments of video poker machines, are not considered a property interest protected by the takings clause.[178] Finally, Mibbs had no reasonable expectation in the value of the five-year contract because he entered into the contract after the Legislature enacted the statute providing for the local option referendum.[179]

The outcome of *Mibbs* sets a standard which, if applied to future claims of video poker operators and owners who stand to lose their machines after July 1, 2000, completely bars, or at least substantially limits, video poker operators' and owners' recoveries. In light of *Mibbs*, successful claimants must prove an actual economic investment in the machines, not just an interest in profits by allowing machines to be operated on the claimant's premises. In these situations, claimants will also be barred from recovery because *Mibbs* limits recoveries to the value of the machine itself and does not include lost profits. Furthermore, machines purchased or obtained during a time period when the continuing legality of the machines was "speculative" will be barred from recovery. Strictly applied, arguably all machines purchased between July 1993 and June 6, 1997,[180] and after June 16, 1999[181] are outside the scope of regulatory takings. Finally, video poker machines are not compensable under the takings clause because they are subject to regulatory licensing.

The court took the point of view that the video poker industry "assumed the risk" by purchasing video poker machines when gambling was such a highly debated issue in South Carolina and since there has been a ban threatened for years. On the other hand, a significant amount of money was invested into the industry, which also brought revenue to the state.[182] Although the legality of the industry has usually been on shaky ground, there have been

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174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id*; *see also* Mitchell Arms, Inc. v. United States, 7 F.3d 212 (Fed. Cir. 1993). In *Mitchell Arms, Inc.*, a firearms importer's investment-backed reliance on a permit for assault rifles was not "property" to support a claim for compensable taking by the Bureau of Alcohol, Tobacco, and Firearms because the area of investment activity was voluntarily entered into and was subject to pervasive governmental control. *Id.* at 216.
179. *Mibbs*, 337 S.C .at 607, 524 S.E.2d at 628.
180. S.C. CODE ANN. § 12-21-2806 (West Supp. 1999), *repealed by* S.C. 1997 Acts 53, § 7 (repeal approved June 6, 1997).
181. *Payout Cap*, *supra* note 46, at 1A. On June 16, 1999, the legislature decided to schedule a referendum to decide the legality of video poker. *Id.*
182. McCormick, *supra* note 3, at 1.

several occasions when the continuing legality of video poker has been reinforced. In fact, at least some of the owners and operators relied upon the decisiveness of the county-by-county referendums in 1994 before investing in the video poker business.[183] With this in mind, it is hardly clear that video poker owners and operators were unjustified in relying upon the legality of video poker when they purchased the machines which likely will become contraband on July 1, 2000.

V. CONCLUSION

Video poker has dominated South Carolina's courts and politics. Even after the ban takes effect in July of 2000, it is likely that South Carolina's courts will continue to consider cases based on South Carolina's Gambling Act, the Takings Clause, and the status of video poker machines as contraband.

The South Carolina Gambling Act creates problems for video poker owners and operators even after the ban. Friends, families, and even strangers of players who lost money playing video poker may succeed in collecting three times the amount lost during a time when owners will not be receiving any video poker income. Lenient pleading requirements as established under *Justice v. Pantry* add to the threat of video poker machine owners and operators having to defend themselves in lawsuits. Even when video poker becomes illegal, plaintiffs who gamble illegally may still recover threefold damages for their losses.

Anyone who presently owns video poker machines stands to lose considerable money when the machines become contraband on July 1, 2000. Exposure to liability will not be avoided by merely storing the machines until a buyer can be found because the machines are considered contraband per se and can be seized and destroyed by the police even if they are not operational. Furthermore, owners will have limited, if any, recourse by asserting claims against the state based on the Takings Clause because their ownership of the machines is not considered a property interest since it is based on regulatory licensing.

The cases involving RICO and class certification will no longer affect the video poker industry after the ban, but will still have an impact on cases involving other industries. The court's decision in *Gentry v. Yonce* changes the presumption that RICO cases arise from fraudulent acts and must be plead with particularity even in the absence of predicate acts involving fraud. Any two violations of a statute, which alone may only constitute misdemeanors, may now be treated as racketeering activity. In fact, RICO violations not alleging fraudulent acts are now easier to maintain in the absence of a requirement to plead the elements of a case with particularity.

Depending on the outcome of the class action suits against video poker owners, more class action suits may follow. The court will encourage future class action suits against video poker owners and non-related industries if it

183. Wilkinson, *supra* note 92, at A1.

allows a class action suit among plaintiffs with little in common with each other. How *Johnson v. Collins Entertainment* is decided will constitute precedent regarding the requirements of class certification.

Overall, even though video poker will be banned on July 1, 2000, the legal issues decided affect future lawsuits. In fact, the ban will instigate new suits interpreting the Takings Clause and the fate of thousands of then-valueless video poker machines. Although many suits appear to stem from social and political issues, fought through the courts, the decisions arising from the video poker cases involve important interpretations of South Carolina and federal law which will serve as precedent in future cases having little, or nothing, to do with gambling.

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